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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 1.4000 of the Commission's	)	
Rules to Preempt Restrictions on Subscriber	)	RM - _____
Premises Reception or Transmission Antennas	)	
Designed To Provide Fixed Wireless Services	)	

PETITION FOR RULEMAKING

THE WIRELESS COMMUNICATIONS
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May 26, 1999

TABLE OF CONTENTS

EXECUTIVE SUMMARY

By this Petition, the Wireless Communications Association International, Inc. ("WCA") requests that the Commission issue a *Notice of Proposed Rulemaking* to amend Section 1.4000 of the Commission's Rules to preempt any non-federal restriction that impairs the installation, maintenance or use of any over-the-air subscriber premises reception or transmission antenna that is one meter or less in diameter or diagonal measurement and is deployed to provide any type of fixed wireless service, subject to the exceptions for safety and historic preservation already included in Section 1.4000.

There is an immediate and compelling need for the rule amendment requested herein. Across the nation, the deployment of fixed wireless services is being prevented or subjected to unreasonable cost and delay due to local zoning, building code, homeowner association and lease restrictions on the deployment of the subscriber premises equipment necessary to provide service. Under the current version of Section 1.4000, a fixed wireless operator or subscriber may seek protection from such restrictions *only* if the operator's package of services incorporates multichannel video and is delivered over frequencies in the MDS, ITFS or LMDS bands. Section 1.4000 provides no protection at all to those fixed wireless operators who do not offer multichannel video service, or who operate in other services, such as those that operate in the DEMS, WCS, 38 GHz and unlicensed frequency bands. Widespread deployment of advanced telecommunications capability in the near term can never be achieved so long as Section 1.4000 only protects fixed wireless operators under such limited circumstances.

The Commission has authority under the Communications Act of 1934, as amended, and a long line of case precedent to provide preemption protection for subscriber premises fixed wireless antennas used in connection with any type of wireless service in any fixed wireless frequency band. Historically, the Commission has exercised that authority where necessary to remove impediments to the development of new wireless services. With Section 706(a) of the Telecommunications Act of 1996, Congress has directed the Commission to encourage the deployment of advanced telecommunications capability on a reasonable and timely basis to all Americans by eliminating barriers to infrastructure investment and by otherwise promoting competition in the market for telecommunications services. Consistent with its mandate under Section 706(a), the Commission can and should stay its pro-competitive and pro-consumer course and exercise its preemption authority to amend Section 1.4000 as proposed in Exhibit A hereto, so that the protections set forth in Section 1.4000 are fully available to all fixed wireless service providers and their customers.

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PETITION FOR RULEMAKING

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.401 of the Commission's Rules, hereby requests that the Commission issue a *Notice of Proposed Rulemaking* ("*NPRM*") to amend Section 1.4000 of the Commission's Rules (the "Antenna Preemption Rule" or the "Rule") to preempt any non-federal restriction that impairs the installation, maintenance or use of any subscriber premises reception or transmission antenna (a "fixed wireless antenna" or an "antenna") deployed to provide any type of fixed wireless service, subject to the "one meter" size requirement and the exceptions for safety and historic preservation already set forth in the Rule. WCA's specific proposed revisions to the text of Section 1.4000 are provided at Exhibit A hereto.

I. INTRODUCTION

WCA is the trade association of the fixed wireless communications industry, representing a broad array of Commission licensees, communications service providers, equipment vendors and others engaged in the provision of video, voice and data services through fixed terrestrial wireless facilities. The Commission's exercise of its authority to preempt non-federal restrictions on subscriber premises antennas used in the provision of fixed wireless services is

a matter of critical importance to WCA's members who today utilize or are planning to deploy Multipoint Distribution Service ("MDS"), Instructional Television Fixed Service ("ITFS"), Local Multipoint Distribution Service ("LMDS"), Wireless Communications Service ("WCS"), Digital Electronic Message Service ("DEMS"), the 38 GHz band, and the unlicensed 2.4, 5.2 and 5.8 GHz bands to provide fixed wireless services to consumers. Accordingly, WCA has an immediate and substantial interest in the Commission's resolution of the issues raised this Petition.

Section 706(a) of the Telecommunications Act of 1996 (the "1996 Act") directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by utilizing, *inter alia*, "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[1/] Without question, the promotion of fixed wireless services is essential if the Commission is to satisfy its Section 706(a) mandate. As noted by Thomas Sugrue, Chief of the Wireless Telecommunications Bureau, during a recent Congressional hearing:

> [S]ervice providers are now offering fixed voice telephony and high-speed Internet access services over spectrum in the [DEMS] and 39 GHz bands. The Commission also recently auctioned Local Multipoint Distribution Service spectrum in the bands around 28 GHz, which should result in a significant number of new licensees offering fixed wireless services over the next few years. It appears that all of these spectrum bands will likely be used primarily for broadband telecommunications applications, although licensees can provide video programming services over this spectrum as well. Because their technology

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[1/] 1996 Act § 706(a), Pub. L. 104-104, 110 Stat. 153 (1996).

> enables them to avoid the installation of new wireline networks, wireless service providers may be among those with the greatest potential quickly and efficiently to offer widespread competitive facilities-based services to end users.[2/]

Already, fixed wireless operators such as Teligent Corp. ("Teligent"), WinStar Communications, Inc. ("WinStar"), People's Choice TV Corp. ("PCTV") and American Telecasting, Inc. ("ATI"), among many others, have introduced a wide array of cost-efficient high-speed broadband services in the DEMS, 38 GHz and MDS bands, respectively, in local markets across the United States.[3/] Teligent, for example, has already launched service in 26

[2/] Statement of Thomas Sugrue, Chief, Wireless Telecommunications Bureau, before the Subcommittee on Telecommunications, Trade and Consumer Protection, United States House of Representatives, re: Access to Buildings and Facilities by Telecommunications Providers (May 13, 1999) (emphasis added) (the "Sugrue Statement"). *See also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 - Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 13 FCC Rcd 19746, Appendix F at F-1 (June 11, 1998) ("The frequencies offer great bandwidth, with data transfer rates of up to 55 Mbs (D-3 capability), which is 1,500 times faster than the standard dial-up modems (28.8 Kbps) and 350 times faster than the ISDN line currently in use (128 Kbps). Once point-to-multipoint technology is implemented, transmission speed will be even faster. . . . Such speed is favorable to bandwidth intensive multimedia applications such as voice and video clips which are becoming more popular on the Internet.") (the "*Third Annual CMRS Competition Report*"); *Amendment of Parts 21 and 74 to Enhance the Ability of Multipoint Distribution Service and Instructional Fixed Television Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112, 19116-17 (1998) (the "*MDS/ITFS Two-Way Report and Order*"); *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services (Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking)*, 12 FCC Rcd 12545, 12621-2 (1997) (the "*LMDS Order*").

[3/] *See, e.g., Third Annual CMRS Competition Report*, Appendix F at F-11 (noting that in markets where WinStar provides local telephone service, its rates are 15-25% lower than those charged by competing RBOCs); Haynes, "Teligent's Test," *Forbes*, at 202 (Mar. 9, 1998) ("How can Teligent, based in Vienna, Va., set its prices so low? For one thing, its capital costs are modest. New York investment bank Salomon Smith Barney estimates that local fiber networks cost up to $300,000 per mile of dug-up road; Teligent's base stations cost a mere $260,000, and each

markets, which include the nation's largest business centers and comprise more than 430 cities and towns with a combined population of more than 75 million.[4/] WinStar provides service in more than 30 markets, including New York, Los Angeles, Chicago, Boston and Dallas.[5/] In addition, the Commission recently adopted comprehensive rules that permit fixed wireless providers to offer a wide variety of two-way broadband services over MDS frequencies,[6/] and PCTV and ATI have deployed such services.[7/] Simply stated, in the proper regulatory environment fixed wireless technology can and will deliver exactly the sort of competitive services that Congress, the Commission and consumers have been waiting for since passage of the 1996 Act.

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one blankets a 30-square-mile area. Moreover, 70% of Teligent's capital expenditure (largely for the connections within each office building) is incurred after it has signed up customers. Fiber operators, by contrast, routinely incur 80% or more of their expenditure before a single customer is on board.").

[4/] "Teligent Reports First Quarter Revenue of $1.5M, Tripling Total for Fourth Quarter 1998," *PR Newswire* (May 12, 1999).

[5/] "WinStar Reports First Quarter Results," *Business Wire* (May 12, 1999).

[6/] *See MDS/ITFS Two-Way Order, supra.*

[7/] PCTV has achieved considerable initial success with its SpeedChoice high-speed Internet access service in the Phoenix market, notwithstanding competition from other high-speed Internet access services offered by incumbent wired competitors. Because nearly 95% of the Phoenix market is within "line of sight" of PCTV's primary wireless transmitter, the company has been able to offer SpeedChoice on a marketwide basis from the date of launch. By contrast, the competing wire-based Internet access services are available to less than half of the greater Phoenix area. Hogan, "Desert High-Speed Data Duel," *Multichannel News*, at 10 (Sept. 7, 1998). *See also*, "Colo. Web Co. Will Use MMDS For Data," *Multichannel Online* (June 23, 1998) (available at http://www.multichannel.com) (announcing launch of high-speed Internet access service over ATI's MDS frequencies in Denver).

By the same token, it is equally clear that the unique and substantial benefits of fixed wireless service cannot be realized so long as fixed wireless operators continue to be shackled by barriers to entry that deny them full and fair access to subscriber premises. As will be discussed in greater detail below, non-federal restrictions on the deployment of antennas at customer locations are imposing significant barriers both to the deployment of wireless infrastructure and to the emergence of competition utilizing that wireless infrastructure.[8/] When wired carriers (whether they be incumbent local exchange carriers or incumbent cable operators) enjoy superior access to the customer, the competitive landscape is skewed. As noted to Congress by William J. Rouhana, Jr., Chairman and Chief Executive Officer of WinStar Communications:

> Telecommunications carriers should compete on the basis of service quality and rates and should not succeed or fail in the market because of discrimination. *The terms, conditions, and compensation for the installation of telecommunications*

[8/] WCA is aware that the Commission is contemplating the adoption of a *Notice of Proposed Rulemaking* to address the circumstances under which building owners must provide competing carriers with access to multi-tenant environments ("MTEs"). *See,* "FCC Prepared to Issue Rules Governing Broadband Access In Buildings," *Washington Telecom Week*, at 2 (May 21, 1999). WCA applauds that effort, for the landlord-related problems wireless service providers have been encountering mirror precisely the issues WCA has raised over the years in the context of landlord restrictions on tenant access to competitive multichannel video programming services. *See, e.g.,* Comments of The Wireless Cable Association International, Inc., CS Docket No. 96-83, at 23-24 (filed May 6, 1996); Petition for Reconsideration filed by The Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 5-6 (filed Dec. 15, 1997). While Section 1.4000 does address landlord restrictions on the installation, maintenance and use of antennas in areas leased for the exclusive use of the tenant, the Rule is far broader in that it covers local zoning ordinances, building codes, homeowner association restrictions and the like. Thus, adoption of a *Notice of Proposed Rulemaking* to address landlord restrictions on access to MTEs will not eliminate the need for the Commission to address the issues raised in this Petition.

facilities . . . must not disadvantage one new entrant vis-à-vis another new entrant.[9/]

As will be discussed below, a variety of non-federal entities (including local governments, homeowner associations ("HOAs") and landlords) have repeatedly impeded deployment of fixed wireless services by subjecting operators and their subscribers to restrictions on the installation, use and maintenance of fixed wireless antennas installed on subscriber premises. The Commission has clear authority under Sections 1, 4(i) and 303 of the Communications Act and a long line of case precedent to preempt such restrictions to ensure that fixed wireless providers are not precluded from delivering the entire menu of services that Congress and the Commission expect them to provide. Section 207 of the 1996 Act directed the Commission to exercise that authority where fixed wireless antennas are deployed to deliver "video programming services," and the Antenna Preemption Rule is the result. WCA is now asking the Commission to exercise that same authority by commencing a rulemaking proceeding to extend the benefits of the Antenna Preemption Rule to all subscriber premises fixed wireless

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[9/] Statement of William J. Rouhana, Chairman and Chief Executive Officer, WinStar Communications, Inc., before the Subcommittee on Telecommunications, Trade and Consumer Protection, United States House of Representatives, re: Access to Buildings and Facilities by Telecommunications Providers (May 13, 1998) (emphasis added). *See also*, Sugrue Statement, n.2 *supra* ("[T]he benefits of competition cannot be fully realized unless competitive local telecommunications services can be made available to all consumers, including both business and residential customers, regardless of where they live or whether they rent or own their premises. To the extent that certain classes of customers are unnecessarily disabled from choosing among competing telecommunications providers, the Congressional goal of deploying services 'to all Americans' is placed in jeopardy.").

antennas, not just those used to provide multichannel video service in the MDS, ITFS or LMDS frequency bands.

WCA must emphasize that it is not asking the Commission to preempt any and all non-federal restrictions on the installation, maintenance or use of fixed wireless antennas. Rather, the specific rules proposed in Exhibit A retain the existing definition of "impair" and the existing exceptions for safety and historic preservation, despite WCA's belief that in certain respects the current Rule does not preempt as broadly as mandated by Congress.[10/] However, to facilitate an

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[10/] As WCA has noted elsewhere, Section 207 by its very terms unequivocally directs the Commission to "prohibit" all restrictions that impair a consumer's ability to receive service, and does not provide for the safety or historic preservation exceptions that have worked their way into the Antenna Preemption Rule. *See, e.g,* Comments of The Wireless Cable Association International, Inc., IB Docket No. 95-59 and CS Docket No. 96-83, at 8 (filed May 6, 1996). Nonetheless, WCA does not necessarily object to permitting state and local governments to impose restrictions that are legitimately based on safety concerns (and not efforts to cloak aesthetic restrictions in safety rhetoric), are non-discriminatory and are no more burdensome than necessary to achieve the legitimate safety objective. However, as the Commission has recognized, HOA restrictions generally address aesthetic concerns which are *not* a legitimate basis for antenna restrictions that impair service. *See Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd 5809, 5821 (1996); *Wireless Broadcasting Systems of Sacramento, Inc.*, 12 FCC Rcd 19746, 19751 (CSB, 1997). Thus, WCA believes the safety exception is seriously flawed in that it permits HOAs with no expertise in or responsibility for public safety to enforce aesthetically-based restrictions merely by adding "safety boilerplate" to their rules and regulations. *See* WCA Reply Comments re: *Victor Frankfurt and Isabella Goncharova*, CSR-5238-0, at 3-4 (filed June 5, 1998). Though the Commission has suggested that it might strike down such "safety boilerplate" on a case-by-case basis, that is of little comfort to subscribers who must remove their antennas and lose service for months at a time while the Commission works through the formal process of preempting illegal HOA restrictions adopted under the rubric of "safety." Simply put, there is no reason to permit an HOA to enforce allegedly "safety-related" restrictions that are more burdensome than those adopted by state and local governmental authorities. Clearly, if state or local governmental authorities charged with protection of the public safety have concluded that there is a less burdensome alternative than the approach taken by the HOA, then that determination should be dispositive evidence that the HOA restriction is more burdensome than necessary. WCA therefore submits that the

expedited grant of this Petition, WCA will not reargue its objections to the current language of the Rule here. In this way, the Commission can rapidly address its Section 706(a) mandate to accelerate the delivery of advanced services to all Americans, without having to reconsider issues already decided in CS Docket No. 96-83.[11/]

II. DISCUSSION

A. The Commission Has Authority Under the Communications Act To Amend the Antenna Preemption Rule As Requested by WCA.

At the outset, there should be no question that the Commission has authority under the Communications Act to amend Section 1.4000 as proposed by WCA. It is well settled that the Commission may preempt any state or local regulation that "stands as an obstacle to the

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Commission's decision to allow HOAs to enforce "safety-related" restrictions *defeats* the accelerated, widespread deployment of fixed wireless service that Congress directed the Commission to promote in Section 706(a) of the 1996 Act. The Commission could remedy the problem by adopting a *per se* preemption of all nongovernmental antenna restrictions that impair installation, maintenance or use of fixed wireless antennas, subject to waiver in exceptional circumstances. *See, e.g.,* WCA Joint Petition for Partial Reconsideration, IB Docket No. 95-59 and CS Docket No. 96-53, at 21-28 (filed Oct. 4, 1996).

[11/] WCA is aware that the Building Owners and Managers Association International ("BOMA"), among others, has appealed the Commission's *Second Report and Order* in CS Docket No. 96-83 to the United States Court of Appeals for the District of Columbia Circuit. *Building Owners and Managers Association International, et al. v. FCC*, Case No. 98-1610 (D.C. Cir., docketed Dec. 23, 1998). The issues raised therein pertain to the Commission's authority to extend the Antenna Preemption Rule to antennas installed on leased property, and as such are separate and distinct from the issues raised in this Petition. Accordingly, the Commission may issue the *NPRM* and amend the Rule as requested by WCA while the BOMA appeal remains pending. Any additional rule amendments required by the D.C. Circuit as a result of the BOMA appeal should be applied equally to all fixed wireless antennas covered by the Rule as revised in Exhibit A hereto.

accomplishment and execution of the full objectives of Congress."[12/] The Commission's authority to so preempt arises first and foremost from Section 1 of the Communications Act, which directs the Commission to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service . . . ."[13/] The United States Supreme Court has confirmed that Congress meant to confer "broad authority" on the Commission, so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."[14/] Thus, Section 4(i) of the Act states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[15/] Similarly, Section 303 gives the Commission the power to issue rules and regulations "as public convenience, interest and necessity requires."[16/] The need for such comprehensive powers stems from "the practical difficulties inhering state-by-state regulation

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[12/] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) ("*Crisp*"), *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also LMDS Order*, 12 FCC Rcd at 12769-12700, *citing Fidelity Fed. S&L Ass'n v. De La Cuesta*, 458 U.S. 141, 156 (1982); *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

[13/] 47 U.S.C. § 151.

[14/] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979), *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (citations omitted). *See also National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) (Congress granted the Commission "expansive powers" through the Communications Act).

[15/] 47 U.S.C. § 154(i).

[16/] *Id.* § 303.

of parts of an organic whole . . . fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communications."[17/]

Accordingly, the Commission has repeatedly exercised its broad authority to preempt non-federal rules and regulations that directly or indirectly impaired the installation or use of antennas necessary for consumers to access wireless services. For instance, in 1983 the Commission preempted state regulation of satellite master antenna television service. In so doing, the Commission noted that:

> [a]lthough preemption was not specifically discussed in our satellite authorization proceedings or in our deregulation of earth stations, we believe it is clear that local prior approval requirements are inconsistent with national policies in these areas. In more general terms, *"receiving sets" have been held to be "absolutely essential instrumentalities" of radio broadcasting.*[18/]

In 1986, the Commission preempted state and local restrictions on satellite receive antennas that are very similar to the restrictions at issue here.[19/] The Commission took such action to give effect to the Congressional policy favoring development of new technologies and

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[17/] *General Telephone of California v. FCC*, 413 F.2d 390, 398, 401 (D.C. Cir. 1968).

[18/] *Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1232 (1983) (citation omitted) (emphasis added), *aff'd sub nom. N.Y. State Com'n On Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984). Similarly, in affirming the Commission's decision in *Orth-O-Vision, Inc.* to preempt state regulation of MDS service, the United States Court of Appeals for the Second Circuit observed that such regulation "could frustrate the development of an interstate network by increasing the cost for each program per receiver." *N.Y. State Com'n On Cable T.V. v. FCC*, 669 F.2d 58, 65-66 (2nd Cir. 1982) (footnote omitted).

[19/] *Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519 (1986) (the "*1986 Satellite Preemption Order*").

expanded consumer choice, as expressed at that time in Section 705 of the Communications Act (47 U.S.C. § 605).[20] Specifically, the Commission concluded that:

> [i]f individuals cannot use antennas to receive satellite delivered signals because of discrimination or excessive state and local regulation, their right of access as established by section 705 [of the Communications Act] to interstate communications delivered by satellite will be useless.... Such regulations would frustrate our competitive regulatory policies which have been promulgated to provide for a variety of service by consumers. It would be contrary to those policies to permit discriminatory local regulation which reduces the range of choice.[21]

Section 207 of the 1996 Act was grounded in the same basic idea, *i.e.*, that Commission preemption of non-federal restrictions on the deployment of antennas on subscriber premises is essential to assure "to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service...."[22] Section 207 was not itself a separate and independent grant of preemption authority to the Commission; rather, Section 207 merely

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[20] *See Local Zoning Regulations (Notice of Proposed Rulemaking)*, 100 FCC Rcd 846, 850 (1985) ("[R]ecent amendments to the Communications Act, 47 U.S.C. § 705, provide that unless the sender has established a marketing system an individual using a satellite antenna at his dwelling may freely receive unscrambled satellite cable programming without incurring any liability for unauthorized interception.... In enacting this legislation, Congress wished to ensure that Americans who did not have access to cable programming would be able to obtain such programming.").

[21] *1986 Satellite Preemption Order* at ¶ 26 (1986). *See also, Preemption of State and Local Laws Concerning Amateur Operator Use of Transceivers Capable of Reception Beyond Amateur Service Frequency Allocations*, 8 FCC Rcd 6413, 6416 (1993) (finding that certain state and local scanner laws "prevent amateur operators from using their mobile stations to the full extent permitted under the Commission's Rules and thus are in clear conflict with federal objectives of facilitating and promoting the Amateur Radio Service").

[22] *See Implementation of Section 207 of the Telecommunications Act of 1996 - Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service (Notice of Proposed Rulemaking)*, 11 FCC Rcd 6357 (1996), *quoting* 47 U.S.C. § 151.

directed the Commission to exercise the preemptive authority it already had "pursuant to Section 303 of the Communications Act"[23] to prohibit restrictions on over-the-air reception of video programming delivered using certain services.

Indeed, the Commission confirmed this very point in its 1996 *Report and Order* in IB Docket No. 95-59 modifying certain provisions of its 1986 satellite antenna preemption rules. In discussing its authority to preempt non-federal restrictions on use of satellite antennas other than those encompassed by Section 207, the Commission stated in no uncertain terms that Section 207 merely directs the Commission to exercise its pre-existing preemption authority in a particular area, and does not confine its broad power to preempt restrictions on receive antennas where necessary to achieve the objectives of the Communications Act:

> Congress has made clear [in Section 207] that, *at a minimum*, we must preempt restrictions imposed on a subset of all satellite earth station antennas, [*i.e.*,] all DBS antennas . . . .We believe that nothing in the new legislation affects our broad authority to preempt state and local zoning regulations that burden a user's right to receive all satellite-delivered video programming (not just the subset specifically singled out by Congress in Section 207) or that inhibit the use of transmitting antennas.[24]

In sum, it is beyond doubt that the Commission has authority under the Communications Act to expand the scope of its Antenna Preemption Rule as requested by WCA, and nothing in

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[23] 1996 Act § 207, Pub. L. 104-104, 110 Stat. 114 (1996). *See also, AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721, 142 L.Ed.2d. 834 n. 5 (1999) ("[T]he 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence *part of*, an Act which said that 'the Commission may prescribe such rules and regulations as may be necessary to carry out the provisions of this Act.'") (emphasis in original).

[24] *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd 5809, 5812 (1996) (footnote omitted) (emphasis added).

Section 207 constrains that authority in any respect.[25/] For the reasons discussed below, exercise of that authority under these circumstances is warranted.

B. There is an Immediate and Compelling Need for the Commission to Preempt Non-Federal Restrictions That Impair Installation, Maintenance or Use of Subscriber Premises Antennas Used With Respect to Any Type of Fixed Wireless Service.

As noted above, Section 706(a) of the 1996 Act directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans", *inter alia*, by removing barriers to infrastructure investment and by promoting competition in the telecommunications market. In CS Docket No. 96-83 and subsequent enforcement proceedings under the Antenna Preemption Rule, the Commission developed an extensive record which demonstrates that non-federal restrictions on deployment of fixed wireless antennas are pervasive, frustrating what Congress attempted to achieve in Section 706(a).[26/] Although the focus of CS Docket No. 96-83 and subsequent cases has been on antennas used to receive video programming, the record developed in those proceedings

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[25/] The Commission's authority here is bolstered by Section 253(d) of the 1996 Act, which directs the Commission to preempt any State or local law that "may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service." 47 U.S.C. § 253(d). In other words, to the extent that fixed wireless operators will be providing "telecommunications services" (and many will, while others may not), Section 253(d) *mandates* that the Commission preempt non-federal antenna restrictions that prevent them from providing wireless services.

[26/] *See, e.g., Implementation of Section 207 of the Telecommunications Act of 1996 - Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service*, 11 FCC Rcd 19276, 19286 ("The record is replete with examples of various requirements imposed on those who wish to install DBS dishes or MMDS antennas on their property") (the "*Section 207 Report and Order*").

demonstrates that the troublesome non-federal restrictions generally are targeted at *all* antennas, regardless of whether they are designed to receive video programming and regardless of the frequency band they use.[27/] The Antenna Preemption Rule, however, only protects the installation, maintenance and use of antennas (fixed wireless or otherwise) that are used to access video programming services in the off-air television, DBS, MDS, ITFS and LMDS frequency bands. As a result, even where the Commission has preempted such restrictions under the Rule, they remain in force and continue to impair the ability of consumers to access wireless services that either do not include video programming or that are delivered by services other than those currently listed in the Rule.

The absurdity of the limited nature of the Antenna Preemption Rule is perhaps best illustrated by examining the services PCTV is offering in Phoenix, AZ. PCTV offers two services, a high-speed Internet access service marketed as "SpeedChoice," and a digital

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[27/] *See, e.g., Jay Lubliner and Deborah Galvin*, 13 FCC Rcd 16107 (1998) (preempting HOA covenant precluding the use of any type of outdoor antenna); *James Sadler*, 13 FCC Rcd 12559 (CSB, 1998) (preempting HOA restriction prohibiting installation of any outdoor antenna not installed by the HOA); *Jordan E. Lourie*, 13 FCC Rcd 16760 (CSB, 1998) (preempting HOA restriction stating that "[n]o exterior television or radio antenna of any sort" may be installed on any structure within the antenna user's property); *Wireless Broadcasting Systems of Sacramento, Inc.*, 12 FCC Rcd 19746 (CSB, 1997) (preempting HOA restriction prohibiting installation of any antennas or satellite dishes on a user's property); *Victor Frankfurt*, 12 FCC Rcd 17631 (CSB, 1997) (preempting HOA restriction stating that "no antennas of any kind may be attached to any part of the building exterior"); *Michael J. MacDonald*, 13 FCC Rcd 4844 (CSB, 1997) (preempting HOA restriction on all antennas one meter or less in diameter); *CS Wireless Systems, Inc. d/b/a OmniVision of San Antonio*, 13 FCC Rcd 4826 (CSB, 1997) (preempting HOA covenant stating that "[n]o antenna or device of any type for receiving or transmitting signals (electronic or otherwise) shall be erected, constructed, placed or permitted to remain on the exterior of any houses, garage or buildings constructed on any lot; nor shall any free standing antenna of any style be permitted to remain on any Lot").

multichannel video programming service marketed as "DigitalChoice." The exact same antenna is installed at a subscriber's premises regardless of whether he or she subscribes to SpeedChoice, DigitalChoice, or both. A subscriber to just the DigitalChoice multichannel video service is clearly entitled to protection under the current Antenna Preemption Rule, as is a subscriber to SpeedChoice who also subscribes to DigitalChoice, since both services are delivered through the same customer premises antenna. If, however, a subscriber elects to subscribe to SpeedChoice only, the subscriber would not enjoy protection under the Antenna Preemption Rule *even though SpeedChoice is delivered to precisely the same antenna as the DigitalChoice service.* Similar anomalies result where a subscriber switches from a fixed wireless service provider who uses frequencies protected by the rule to a technologically and functionally similar provider who uses frequencies that are not protected (*e.g.*, WCS, DEMS, 38 GHz).[28/]

[28/] Moreover, this regulatory imbalance will be compounded even further by virtue of the ongoing convergence of personal computing with digital television ("DTV") technology. As observed by Microsoft:

> [DTV] will be both evolutionary and revolutionary. DTV will enhance existing programming, such as movies and sports, by adding to them higher quality audio and video, a wide-screen format, and new, program-related information. In this respect, DTV represents the next logical step in the evolution of consumer products toward increasing multimedia capability. Just as television added pictures to radio to create a new experience, DTV is poised to add the power of computing and the Internet to television programming to provide consumers with more enriching entertainment and informational opportunities.

Comments of Microsoft Corporation, CS Docket No. 98-120, at 1-2 (filed Oct. 13, 1998). When viewed in this context, another inequity of the Antenna Preemption Rule becomes apparent: antennas used to receive broadband services carried via terrestrial DTV signals will be protected under the Rule, even if the antenna does not receive a video programming service, since Section 1.4000 explicitly covers all off-air television receive antennas. Yet, antennas used to access

It cannot be emphasized enough that fixed wireless operators will be launching service in the face of substantial competition from approximately 4,000 companies that already provide Internet connectivity,[29/] including incumbent local exchange carriers and cable MSOs who already have a substantial head start in the race to bring high-speed Internet access and other advanced services to consumers.[30/] Fixed wireless is above all else a *service-oriented* business, and in a highly competitive environment fixed wireless subscribers will not tolerate delays in service created by local restrictions on the deployment of their antennas. Instead, they will switch to alternative providers who are free to install service immediately without threat of sanction by local authorities, property owners or HOAs.[31/] Thus, failure to preempt as requested

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identical services via MDS, WCS, ITFS, DEMS, LMDS, and 38 GHz frequencies will not be protected. Again, there is no sensible public interest justification for the Commission to promote this sort of discriminatory regulation. *See, Duplicative and Excessive Over-Regulation of Cable Television*, 54 F.C.C.2d 855, 864 (1975) ("The communications structure of this nation can no longer be simply segmented into traditional technically oriented or functionally oriented independent parts. The communications provided by broadcasters, common carriers, specialized carriers such as multipoint distribution services, satellite, etc., and cable must all be viewed with the objective of achieving a unified whole, a structure that will indeed accomplish the goal set for us in the Communications Act of a '. . . rapid, efficient, nationwide and worldwide wire and radio communications service.'").

[29/] "Cable Companies Staking Claim in ISP Race," available at http://www.statmarket.com (May 3, 1999).

[30/] *See id.* (noting that cable-based ISPs RoadRunner and @Home have nearly doubled their market share since last quarter); "Broadband Services Gained More Visibility: DSL Led Pack," *Broadband Networking News* (Jan. 9, 1999) (projecting that by 2004, ADSL and cable modem service will have a 37% and 26% share of all broadband subscribers, respectively).

[31/] *See, e.g., Section 207 Report and Order*, 11 FCC Rcd at 19287 (noting that prior approval and fee requirements "can impede a service provider's ability to compete, since customers will ordinarily select a service less subject to uncertainty and procedural requirements").

by WCA tilts the competitive balance substantially in favor of incumbents. As such, it would represent a breach of faith with those fixed wireless operators who have already invested hundreds of millions of dollars towards acquiring licenses and constructing facilities to introduce innovative wireless technologies to the marketplace and offer consumers a *bona fide* choice of service providers.[32/]

Finally, the Commission has recognized that competition spurs incumbents to introduce new services or improve existing ones.[33/] The simple fact is that incumbents have less incentive to bring advanced services to consumers as quickly as possible if there is no threat that a competitor will be able to offer that same service. The fastest possible introduction of advanced services to the marketplace is promoted by Commission rules that allow head-to-head competition between incumbents and fixed wireless providers who have the ability to compete aggressively for customers. So long as non-federal restrictions frustrate the rapid deployment of fixed wireless customer premises antennas, that head-to-head competition will be restrained. That, obviously, is not what the 1996 Act sought to promote, and thus militates strongly in favor of the amendments to the Antenna Preemption Rule advocated by WCA.

[32/] *See, e.g., Third Annual CMRS Competition Report*, Appendix A, Table 1B (noting that the winning bids in the MDS and LMDS auctions totaled $216,239,603 and $578,663,029, respectively).

[33/] *See, e.g., Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Notice of Proposed Rulemaking*, 9 FCC Rcd 7665, 7666 (1994) ("[I]n providing communications services, the public interest is better served by competition. A competitive industry framework promotes lower prices for services, provides incentives for operators to improve those services and stimulates economic growth.").

III. CONCLUSION

The essence of this Petition is embodied in Chairman Kennard's recognition that:

> If we do not move quickly to open up the pathways that will make the potential of broadband technology a reality, then we are not doing the job entrusted to us by Congress. Our obligation, as I see it, is to create the right environment for fair competition in accordance with the law laid down by Congress, and then to stand back and let the competitors try to outdo each other to earn the right to serve the American consumer, by offering new and better and faster and cheaper services.[34/]

WCA wholeheartedly agrees. The fact remains, however, that the Chairman's vision will not become reality unless the Commission relieves fixed wireless providers of non-federal burdens that impede market entry and preclude the competition Congress intended to promote with the 1996 Act. Therefore, for the reasons set forth above, WCA urges the Commission to issue a *Notice of Proposed Rulemaking* to amend Section 1.4000 as set forth in Exhibit A to assure that all fixed wireless antennas used in the provision of *any* type of wireless service on

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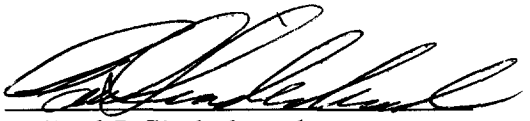
[34/] Press Statement of Chairman Kennard on FCC's Actions to Promote Deployment of Advanced Telecommunications Services by All Providers, 1998 FCC LEXIS 4021 (Aug. 6, 1998).

any frequency will hereafter be entitled to full preemption protection consistent with the parameters already set forth in Section 1.4000.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

By: 
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May 26, 1999

EXHIBIT A

Section 1.4000 of Title 47 of the Code of Federal Regulations is amended to read as follows:

(a) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulation, or any private covenant, homeowners's association rule or similar restriction on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property, that impairs the installation, maintenance, or use of:

(1) an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska;

(2) a subscriber premises reception or transmission antenna that is designed to provide ~~receive video programming~~ any wireless service ~~via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services~~, and that is one meter or less in diameter or diagonal measurement;

(3) an antenna that is designed to receive television broadcast signals; or

(4) a mast supporting an antenna described in subparagraphs (1), (2) and (3) above

is prohibited, to the extent it so impairs, subject to paragraph (b). For purposes of this rule, a law, regulation or restriction impairs installation, maintenance or use of an antenna if it: (1) unreasonably delays or prevents installation, maintenance or use; (2) unreasonably increases the cost of installation, maintenance or use; or (3) precludes reception of an acceptable quality signal. Any fee or cost imposed on a viewer by a rule, law, regulation or restriction must be reasonable in light of the cost of the equipment or services and the rule, law, regulation or restriction's treatment of comparable devices. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any restriction or regulation prohibited by this rule except pursuant to paragraph (c) or (d). In addition, except with respect to restrictions pertaining to safety and historic preservation as described in paragraph (b) below, if a proceeding is initiated pursuant to paragraph (c) or (d) below, the entity seeking to enforce the antenna restrictions in question must suspend all enforcement efforts pending completion of review. No attorney's fees shall be collected or assessed and no fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction. If a ruling is issued adverse to a viewer, the viewer shall be granted at lest a 21 day grace period in which to comply with the adverse ruling; and neither a fine nor a penalty may be collected from the viewer if the viewer complies with the adverse ruling during this grace period, unless the

proponent of the restriction demonstrates, in the same proceeding which resulted in the adverse ruling, that the viewer's claim in the proceeding was frivolous.

(b) Any restriction otherwise prohibited by paragraph (a) is permitted if:

(1) it is necessary to accomplish a clearly defined, legitimate safety objective that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas to which local regulation would normally apply; or

(2) it is necessary to preserve a prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register of Historic Places, as set forth in the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470, and imposes no greater restrictions on antennas covered by this rule than are imposed on the installation, maintenance or use of other modern appurtenances, devices or fixtures that are comparable in size, weight, and appearance to these antennas; and

(3) it is more burdensome to affected antenna users than is necessary to achieve the objectives described above.

(c) Local governments or associations may apply to the Commission for a waiver of this rule under Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3. Waiver requests must comply with the procedures in subsections (e) and (g) of this rule and will be put on public notice. The Commission may grant a waiver upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No petition for waiver shall be considered unless it specifies the restriction at issue. Waivers granted in accordance with this section shall not apply to restrictions amended or enacted after the waiver is granted. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(d) Parties may petition the Commission for a declaratory ruling under Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, or a court of competent jurisdiction, to determine whether a particular restriction is permissible or prohibited under this rule. Petitions to the Commission must comply with the procedures in subsections (e) and (g) of this rule and will be put on public notice. Any responsive pleadings in a Commission proceeding must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies in a Commission proceeding must be served on all parties and filed within 15 days thereafter.

(e) Copies of petitions for declaratory rulings and waivers must be served on interested parties, including parties against whom the petitioner seeks to enforce the restriction or parties whose

restrictions the petitioner seeks to prohibit. A certificate of service stating on whom the petition was served must be filed with the petition. In addition, in a Commission proceeding brought by an association or a local government, constructive notice of the proceeding must be given to members of the association or to the citizens under the local government's jurisdiction. In a court proceeding brought by an association, an association must give constructive notice of the proceeding to its members. Where constructive notice is required, the petitioner or plaintiff must file with the Commission or the court overseeing the proceeding a copy of the constructive notice with a statement explaining where the notice was placed and why such placement was reasonable.

(f) In any proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular governmental or nongovernmental restriction complies with this section and does not impair the installation, maintenance or use of devices of any antenna covered by this rule ~~designed for over-the-air reception of video programming services~~ shall be on the party that seeks to impose or maintain the restriction.

(g) All allegations of fact contained in petitions and related pleadings before the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all petitions and pleadings should be addressed to the Secretary, Federal Communications Commission, 445 12th Street, N.W., Washington, DC 20554, Attention: Cable Service Bureau. Copies of the petitions and related pleadings will be available for public inspection in the Cable Reference Room in Washington, D.C. Copies will be available for purchase from the Commission's contract copy center, and Commission decisions will be available on the Internet.

(h) So long as the property owner consents, a person residing on the property owner's property with the property owner's permission shall be treated as an antenna user covered by this rule and shall have the same rights as the property owner with regard to third parties, including but not limited to local governments and associations, other than the property owner

CERTIFICATE OF SERVICE

I, Loretta B. Rias, hereby certify that copies of the foregoing Petition for Rulemaking were served this 26th day of May, 1999, via hand delivery, upon the following:

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Washington, DC 20554

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Federal Communications Commission
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Washington, DC 20554

Commissioner Michael Powell
Federal Communications Commission
445 - 12th Street, S.W., Room 8-A204
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Commissioner Harold Furchtgott-Roth
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